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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 52 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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COMMISSIONER OF INTERNAL REVENUE,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

Petitioners believe that a reply is required to certain of Respondent's arguments in order to clarify the issues and aid the Court.[1]

[1] This Reply Brief follows the order of Argument in Petitioners' main Brief.

I.

Under Illinois Law, Decedent Retained No Possibility of Interest in the Trust Property. The Trust Corpus Was, Therefore, Not Includable in His Gross Estate For Tax Purposes.

Respondent argues (Res. Br. p. 9) that, under Illinois law, if Spiegel had outlived all of his children and their descendants "the corpus would be restored to him in such circumstances, just as though he had explicitly provided therefor." If this statement were in accordance with Illinois law, Spiegel would have had a possibility of reverter by operation of that law, which might or might not require the corpus to be included in decedent's gross estate (Pet. Br. pp. 34-46). If, on the other hand, Respondent's statement does not accord with applicable Illinois law, his entire case falls, since his theory of liability rests (as it must under Respondent's Regulations) upon a claim that Spiegel, at his death, retained a possibility of reverter by operation of Illinois law.

There can be no possibility of reverter by operation of Illinois law after a vested remainder in fee.

Respondent's statement is not in accordance with Illinois law. Under that law, the corpus of the trust could not have come back to Spiegel under any circumstances since he completely disposed of all interest in the trust property when he made gifts of vested remainders in fee. There can be no possibility of revertor of property which has been transferred by a vested remainder in fee, whether the transfer is by testamentary disposition, by deed or by *inter vivos* trust.

A vested remainderman must be ready to take possession

of property in remainder, whenever and however the preceding estate ends, for, as stated in *Lachenmyer* v. *Gehlbach*, 266 Ill. 11, 17:

> "A vested remainder is one which throughout its continuance gives to the remainder-man, or his heirs, the right to the immediate possession, whenever and however the preceding estates may determine."

If a vested remainderman is not alive to take possession upon the termination of the next preceding estate, his next-of-kin or legatees will take in his place (Pet. Br. pp. 21-2).

Since possession of a vested remainder must, by definition, pass to the remainderman, his next-of-kin or legatees upon the termination of the preceding estate under any conditions, the creator thereof can never recover back any part of the property, which is the subject of the vested remainder. A vested remainderman may, of course, be divested of his interest by a specific condition subsequent, but, in that event, possession of the property passes, upon the occurrence of the condition, to those persons (and those persons only) who are named in the condition. If those named in the condition are not available to take, there will be no reverter and no failure of the trust; there will simply be no divestment and the remainder interests will remain where they are—in the remainderman, his next-of-kin or legatees (Pet. Br. pp. 22-5).

There can be no failure of a trust which provides for a vested remainder in fee.

All this is horn-book law. However, Respondent, apparently, overlooks these elementary principles of property law and advances the novel theory (Res. Br. p. 11) that a trust will fail at any time at which there is no living designated beneficiary who may take possession of the trust property upon the trust's termination.

We have no quarrel with Respondent's arguments that, *if* a trust fails (as may happen when contingent remainders are created), there will be a reverter or resulting trust to the settlor. We do however, most emphatically challenge his contention that there *can* ever be a failure of a trust which provides for a vested remainder in fee, as, by definition, there must always be a beneficiary (whether the named remainderman, his next-of-kin or legatees) ready to take possession of a vested remainder upon any termination of the trust. See, Restatement of the Law of Trusts, § 411 (*l*).

A resulting trust or reverter is nothing more than the right of a settlor, who has conveyed complete *legal* title to a trustee, to receive back from the trustee title to any portion of the trust property, the full *equitable* title to which has not been transferred by reason of failure to designate a person to take under the circumstances which occur.[2] There can, therefore, be no reverter or resulting trust with respect to, and no failure of, a trust which completely disposes of the entire legal and equitable interest in property by vested remainders in fee.

We submit that the Spiegel remainders were vested and that, therefore, the trust could not fail (Pet. Br., pp. 17-20,

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[2] See, 3 Scott, Trusts, Sec. 411.5, p. 2182:

"Where property is given in trust for one beneficiary for life and to another beneficiary in remainder, and before the termination of the trust the latter beneficiary dies intestate and without heirs or next of kin, it would seem that his interest passes to the state, and that a resulting trust will not arise in favor of the settlor or his estate. In such a case, since the entire beneficial interest, subject to the preceding life estate in the other beneficiary, vested in the beneficiary entitled in remainder absolutely at the time of the creation of the trust, it would seem that the trust does not fail on his death, so as to give rise to a resulting trust, but his interest passes to the state as *ultimus haeres*. On the other hand, if the beneficial gift over is contingent, and the contingency does not occur, a resulting trust will arise in favor of the settlor or his estate."

21-25). Spiegel could, accordingly, take no interest therein by reverter, resulting trust or otherwise.

Respondent's inconsistent positions with respect to the vested character of the instant remainders.

1. At the oral argument before the Circuit Court of Appeals, Respondent conceded that the instant remainders were vested but contended, there, that, under the *Hallock* decision, the character of the remainders was of no tax consequence. He overlooked, at that time, the fact that there can be no possibility of reverter by operation of law after a vested remainder in fee.

2. Subsequently, in his Memorandum in reply to the Petition for Certiorari, Respondent again conceded (Memorandum, p. 8) that the Spiegel remainders were vested but argued there is no substantial difference between a vested remainder, subject to divestment, and a contingent remainder. Respondent, there, overlooked the fact that the Illinois decisions, upon which he relied to support his position, had been squarely overruled by the Illinois Supreme Court (Pet. Br. p. 20).

3. Now, in his Brief, Respondent takes a third—equally unsound—position. He argues (Res. Br. pp. 11-12) that *Lachenmyer* v. *Gehlbach*, *supra*, and similar decisions involving wills (which hold that remainders, such as those of the instant trust, are vested remainders), "are of little aid in construing an *inter vivos* trust."

Illinois courts apply the same rules to vesting of remainders whether created by will, deed or trust.

Respondent's novel theory finds no support in the Illinois decisions. Certainly, the rule laid down in Gray, The

Rule Against Perpetuities (relied upon in *Lachenmyer* v. *Gehlbach, supra,* at p. 19, as authority for the decision that the remainders, there before the court, were vested remainders) is not applicable solely to testamentary dispositions; Gray's work covers future interests generally. Further, Williams on Real Property, Blackstone's Commentaries, Kent's Commentaries and Fearne on Contingent Remainders (also relied upon in *Lachenmyer* v. *Gehlbach, supra,* at pp. 17-18) are texts which deal with transfers in general. In the light of the authorities upon which the court relied, it is, therefore, impossible to follow Respondent's argument that *Lachenmyer* v. *Gehlbach* laid down a rule of vesting which cannot be applied to *inter vivos* transfers in trust.

Harder v. *Matthews,* 309 Ill. 548, and *Smith* v. *Dugger,* 310 Ill. 624, were both decisions dealing with *inter vivos* deeds and each relied upon, and Respondent concedes (Res. Br. p. 15) that they relied upon, *Lachenmyer* v. *Gehlbach,* which dealt with a will.

Temple v. *Scott,* 143 Ill. 290 (1892), involved the question whether remainders under an *inter vivos* trust were contingent or vested. The court determined that the remainders were contingent and (pp. 296-8) reviewed the applicable law. The authorities, relied upon by the court, were Blackstone's Commentaries, Kent's Commentaries, Washburn on Real Property, Preston on Estates, three Illinois decisions dealing with testamentary transfers, a New York decision involving a will and a Massachusetts decision dealing with an *inter vivos* trust. It is accordingly clear that the court did not believe that a different rule should be applied to determine the character of a remainder, created by a will or deed, than that applied to determine the character of a remainder created by *inter vivos* trust.

Again, in *Strode* v. *McCormick,* 158 Ill. 142 (1895), the court was required to determine whether interests under

an *inter vivos* trust were vested or contingent. In its decision, the court relied (p. 148) upon rules with respect to vesting of remainders, laid down in five Illinois decisions involving transfers by will, and two English decisions likewise dealing with testamentary dispositions.

This Court, in *Klein v. United States*, 283 U. S. 231 (1931), had to determine whether an Illinois deed created a vested or contingent remainder. It decided that the remainder, there before the Court, was contingent upon the authority of two Illinois decisions, each of which dealt with transfers by will (Pet. Br. pp. 28-9).

In *Coolidge* v. *Long*, 282 U. S. 582 (1931), the Court considered an *inter vivos* trust, which cannot be distinguished from the Spiegel trust and held (p. 597):

> "By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons, subject to be divested only by his death before the death of the survivor of the settlors. It was a grant *in praesenti* to be possessed and enjoyed by the sons upon the death of such survivor. * * *"

The dissenting opinion in *Coolidge* v. *Long*, likewise, held (p. 609) that the remainders were vested. Thus, this Court applied to an *inter vivos* trust the same rule with respect to vesting of remainders as did the Illinois court in *Lachenmyer* v. *Gehlbach*, *supra*.

See also, to the same effect, *Cole* v. *Sewell*, 2 H. L. C. 185, 236 (1848), and *In Re Friend's Settlement*, 1 Ch. 47 (1905), which considered *inter vivos* trusts.

Accordingly, it is abundantly clear that courts hold that, if a remainder created by will is vested, the same remainder would be vested if created by deed or *inter vivos* trust instrument.

It is proper that the same rules should apply to vesting of remainders regardless of the instrument by which they are created.

There is good reason why the same language in a will, deed or living trust should create the same character of remainder.

Illinois courts strongly favor the vesting of estates whether created by *inter vivos* trust, by will or by deed. *Wyeth* v. *Crane*, 342 Ill. 545, 550 (1931) and *Poehlman* v. *Leinweber*, 288 Ill. 58, 63 (1919).

In Illinois, as stated in *Merchants Loan and Trust Co.* v. *Patterson*, 308 Ill. 519, 530-31 (1923):

> "It is a fundamental proposition that equitable estates are governed by the same rule as legal estates, otherwise inextricable confusion would ensue."

See also, *Nave* v. *Bailey*, 329 Ill. 235, 244 (1928), and cases there cited. The interests and titles of *cestuis que trust* are "subject to the same incidents and are governed by the same rules of construction as legal estates." See 5 Thompson on Real Property (Perm. Ed.) 16.

Respondent, however, contends that the rule of vesting, adopted in *Lachenmyer* v. *Gehlbach*, *supra*, was established to avoid intestacy (Res. Br. pp. 11-12). He argues that a testator must be dead and therefore cannot deal with his undisposed of property, whereas the settlor of an *inter vivos* trust may be alive and able to dispose of any property which may revert to him. Respondent's argument, however, must be considered in the light of his agreement that rules with respect to vesting of remainders created by wills apply with equal force to deeds (Res. Br. p. 15). Certainly, the grantor of a deed is as likely to be alive and able to dispose of any property which may revert to him

as the settlor of a trust. As to Respondent's argument (Res. Br. p. 13), based upon an alleged analogy between a possibility of reverter and a lapsed legacy, it need only be noted that there can be no reverter (no lapse) of property transferred *inter vivos* by vested remainder, the transfer of which is effective immediately.

Spiegel intended to make an absolute transfer of the trust property without retention of any interest therein.

Respondent devotes a portion of his Brief to argument that Spiegel intended the trust property to revert to him if all his children and their descendants predeceased him (Res. Br. pp. 13-15). The argument is not persuasive. It is difficult to imagine that Spiegel would have objected to a child's *interest* in corpus passing to the child's next-of-kin or legatees during Spiegel's lifetime, since, by the terms of the trust, *possession* of the property (and whatever control the Trustee had over it) could not pass until Spiegel's death in any event. Further, immediately upon the decedent's death, possession of corpus would pass to the named children, if they were living, to do with as they pleased. There, accordingly, seems to be no logical reason why Spiegel would have objected to possession of the property passing *upon his death* (and that is the only time at which possession could pass) to a child's next-of-kin or legatee if the named child died before Spiegel, since, if the child had died the day *after* Spiegel's death, he could pass the property to his next-of-kin, legatees or anyone whomsoever.

Respondent refers (Res. Br. p. 14) to the spendthrift clause as evidence of the decedent's intent that the corpus should revert. That clause, by its terms, refers only to "payments" of income and not to the division of corpus. It was less restrictive than the spendthrift provisions of the trusts in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339

(1929). (*Reinecke* R. 21, 29, 36, 44). Further, in Illinois, the existence of a spendthrift clause is not considered in the determination of the character of a remainder as vested or contingent, *O'Hare* v. *Johnston*, 273 Ill. 458, 469 (1916) and *Von Kesler* v. *Scully*, 267 Ill. App. 495, certiorari denied by Illinois Supreme Court; and it has been held that a spendthrift provision is an affirmative indication of intent to create a vested remainder. *McArthur* v. *Scott*, 113 U. S. 340, 381 (1885), cited with approval in *Thomas* v. *Stoakes*, 328 Ill. 115, 121, and *Pingrey* v. *Rulon*, 246 Ill. 109, 119-120.

Respondent's Brief (pp. 13-14) also refers to *Geiger* v. *Geer*, 395 Ill. 367, *Meldahl* v. *Wallace*, 270 Ill. 220, and *Routt* v. *Newman*, 253 Ill. 185, for the proposition that rules as to early vesting give away before circumstances pointing the other way. The authorities cited, while they may sustain that proposition, have no bearing on the instant case.

Geiger v. *Geer* involved a claim that, upon a testator's death, his heirs took vested interests under a testamentary trust, which provided that remainders in fee should, upon the death of respective life tenants, descend "in accordance with the laws of descent then in force in this State." The court determined that, under a proper construction of the will, each remainder would, upon the death of a life tenant, go to the life tenant's heirs and not, as contended, to the testator's heirs and that the latter took no interest upon the testator's death.

Meldahl v. *Wallace* involved an *inter vivos* trust under which the settlor retained a life estate. The remaindermen were children of the settlor "and the survivor or survivors of them." Each remainderman was granted a general testamentary power to appoint a portion of the trust property if she predeceased the life tenant. If a remainderman died intestate during the settlor's life, the remainderman's husband was given the same right to property in remainder as he would have under the statute of descent with respect to

his wife's property, and the balance of the property in remainder went to the children of the deceased remainderman. The court held that the remainders were contingent, reasoning that, if there had been an intention to grant vested remainders, there would have been no occasion for the foregoing provisions, since, without any such provisions, a vested remainderman would have had the right to dispose of the remainder by will, and a vested remainder would have passed by descent to the remainderman's husband and children. The Spiegel trust contained none of the provisions which the court, in the *Meldahl* case, found to indicate an intent not to give a vested remainder and the *Meldahl* decision, is, in reality, an authority for construing the Spiegel remainders to be vested.

We have already commented on the *Routt* case. See Petitioners' Brief p. 27.

The record does not support respondent's argument as to Spiegel's intent.

There is, however, a complete answer to Respondent's psychological researches into Spiegel's intent. The Record discloses only two pieces of evidence of intent, other than that which is to be found in the trust instrument itself. Spiegel stated to the attorney, who drew the trust, on several occasions prior to its drafting, that he desired and intended the trust property to be transferred for the benefit of his children, and wanted, at no time, to have any interest or title therein (R. 34-35). Actuarial evidence showed that Spiegel's chances of outliving his three children, who were beneficiaries under the trust and living at the date of its execution, were less than 17 out of 1,000 (R. 35-36, 129).[3]

[3] These figures do not take into account chances of surviving the three children and their unborn descendants. There could be no actuarial computation of chances of surviving three children and their unborn descendants. See *Robinette* v. *Helvering*, 318 U. S. 184, 188-189 (1943).

Respondent states (Res. Br. p. 15) that "the language of the Court [in *Smith* v. *Dugger*, *supra*, 310 Ill. at 626,] strongly indicates" that, if one of the grantees, there involved, had died during the lifetime of the grantor and all of his co-grantees had predeceased him, such grantee's share would have reverted to the grantor. We are certain that Respondent made that statement inadvertently. In *Smith* v. *Dugger*, the court did not indicate, strongly or weakly, that, if the last surviving grantee predeceased the grantor, there would be a reverter. The court did say that such was the *"contention"* of the appellee and then proceeded to decide the case in favor of the appellant.

We submit that Spiegel, at the date of his death, had no interest in corpus and no possibility of ever acquiring such interest, whether by reverter, resulting trust, or otherwise.

II.

Reinecke v. Northern Trust Company, 278 U. S. 339, Controls the Case at Bar.

Petitioners contend that the decision of this Court in *Reinecke* v. *Northern Trust Company*, *supra*, controls the instant case (Pet. Br. pp. 30-34). The *Reinecke* trusts were governed by Illinois law, and the provisions thereof cannot be distinguished from those of the instant trust. If the settlor in *Reinecke* had no interest in trust corpus at the time of his death, Spiegel had no interest in trust corpus.

Respondent, however, brushes off (Res. Br. pp. 24-25) the *Reinecke* decision with the statement that it:

> "was decided in 1929, prior to the decision in the *Hallock* case where the importance of a reversionary

interest in a trust was finally established. It does not appear from the Court's opinion in the *Northern Trust Co.* case that there was a possibility of reversion to the settlor, but even assuming that there was, nevertheless the point as to its effect was not raised or considered and the decision there is thought to stand merely for the proposition that *where the grantor of a trust has parted with both the possession and the entire beneficial interest in the property, retaining no possibility of reversion*, the mere passing of possession or enjoyment of the trust fund from the life tenant to the remainderman after the grantor's death, as directed in the trust instrument, is not sufficient to subject the property to inclusion in the gross estate as a transfer intended to take effect at or after death." (Italics ours.)

Respondent advances no facts to show that the instant case is distinguishable from *Reinecke*, yet he argues, by indirection and implication, that Spiegel retained a possibility of reverter by operation of law. The Court found no such possibility in the *Reinecke* case and there is no basis for Respondent's contention in the case at bar.

Respondent's statement (Res. Br. p. 25) that no point was raised or considered in *Reinecke* as to the effect of a possibility of reversion is not correct. In the taxpayer's brief, filed in the *Reinecke* case in this Court, it is stated (p. 11):

> "Under the trusts in the instant case at the time of death there were no interests in the decedent in the properties in question upon the transfer of which the tax might be imposed."

A reversion is (and was in 1929) an interest upon which the tax could be imposed, and the Court in *Reinecke* had to (and did) find that there was no possibility of reversion before it could decide that the settlor had, as Respondent puts it (Res. Br. p. 25):

> "parted with * * * the entire beneficial interest in the property, retaining no possibility of reversion."

In *Reinecke*, the Court held that estate taxes were imposed, under the second clause of the earlier counterpart of Section 811(c), only on property interests which passed *from* a decedent upon his death. The decision required determination whether the decedent, during his lifetime, had completely transferred possession and enjoyment. The fact that the beneficiaries received possession of corpus at or after the settlor's death was deemed of no consequence in determining taxability. Likewise, the question now before the Court is whether Spiegel had *given away* all interest in the trust property prior to his death. The Federal estate tax is imposed upon the transmission of property *from* a decedent at the date of death, and is unlike a succession tax which taxes the right to *receive* a decedent's property upon death. As this Court said in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50 (1924):

> "What this law taxes is not the interest to which the legatees and devisees succeed to on death, but the interest which ceased by reason of the death."[4]

If all interest in property has been disposed of by a decedent prior to his death, as in both *Reinecke* and the case at bar, no interest therein can cease by reason of his death and the fact that beneficiaries take possession at the settlor's death is of no estate tax consequence.

We submit that *Reinecke* is on all fours with the instant case, and that the decision here must be the same as it was in *Reinecke*, namely, that the decedent gave away all interest in trust corpus during his lifetime, and, accordingly, that no part of the corpus was includable in gross estate.

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[4] See also, *Chase National Bank* v. *U. S.*, 278 U. S. 327, 336 (1929); *Ithaca Trust Co.* v. *U. S.*, 279 U. S. 151, 155 (1929); *Edwards* v. *Slocum*, 264 U. S. 61, 62-63 (1924); and *Nichols* v. *Coolidge*, 274 U. S. 531, 541 (1927).

III.

Even Though Decedent Had Retained a Remote Possibility of Reverter by Operation of Law, the Trust Corpus Would Not Be Taxable Under Section 811(c).

Respondent, on the erroneous assumption that Spiegel retained a possibility of reverter by operation of Illinois law, argues (Res. Br. pp. 16-26) that the trust corpus was includable in gross estate under Section 811(c), *as a matter of law*. He does not answer, or purport to answer, Petitioners' contention, that, even though Spiegel had, as a matter of law, retained a remote possibility of reverter by operation of law, the trust corpus, nevertheless, would not be includable in gross estate unless, in fact, he intended to retain the possibility.

In connection with Respondent's argument on this branch of the case, it should be noted that, in *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108 and *Commissioner* v. *Field*, 324 U. S. 113 (cited in Respondent's Brief, pp. 16-19), there were express rights or interests retained by the settlors of the trusts there before the Court, and both cases, accordingly, fall squarely within the decision of this Court in *Helvering* v. *Hallock*, 309 U. S. 106 (1940), which did not consider the tax effect of possibilities of reverter by operation of law. In addition, the Court did not, in either the *Fidelity-Philadelphia* or the *Field* case, consider whether the interests, there retained, rendered trust corpus subject to tax under Section 811(c), but, in each case, limited its consideration solely to the question of the *amount* and *value* of corpus to be taxed. See *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. *supra*, at p. 109, and *Commissioner* v. *Field*, 324 U. S., *supra* at p. 114.

As to Respondent's reference to the Regulations (Res. Br. pp. 20-22), to the extent that the Regulations purport

to impose a tax on property subject to a remote reverter by operation of law, regardless of whether or not the decedent, in fact, intended to retain such a possibility, we submit that the Regulations go beyond the provisions of Section 811(c) and are invalid.

Respondent argues (Res. Br. p. 23) that the decision of the Court of Claims in *Pennsylvania Co.* v. *United States*, 62 F. Supp. 697, is inconsistent with the decision of the same court in *Central Hanover Bank & Trust Co.* v. *United States*, 58 F. Supp. 565, one of the authorities relied upon by Petitioners for their contention that intent to transfer property by a conveyance, effective at or after death, must be found as a fact in order to render the transfer taxable under Section 811(c) (Pet. Br. p. 40). The *Pennsylvania Co.* decision is not inconsistent with the *Central Hanover* decision. The *Pennsylvania Co.* case dealt with a trust involving both an express retention of a reversion by the settlor (p. 700) and also of a testamentary power of appointment (p. 700); the case, thus, falls squarely within the *Hallock* doctrine. In the *Central Hanover* case, the Court dealt solely with a possibility of reverter by operation of law.

Respondent cites *Estate of Leaman*, 5 T.C. 699, as a Tax Court holding "in circumstances quite similar to those in the instant case" that there was a taxable transfer. (Res. Br. p. 23.) However, the facts involved in the *Leaman* case are not comparable to those in the instant case. In the *Leaman* case, the Tax Court said (pp. 701-2):

> "We turn now to the case at bar. The immediate family of the grantor prior to his death consisted of a son, the infant daughter of that son, and a wife. Except for the reserved power to appoint up to one-third of the corpus to her, no disposition of corpus was made in favor of his wife. Obviously the grantor had not done everything he thought he could do to give away

the corpus. Should he have survived his son and granddaughter, there would have remained his wife and/or his next-of-kin to inherit his estate. *It is clear that he intended the transfer to take effect at his death,* even though he did not see fit to insert the surplus provision that the corpus return to him." (Italics ours.)

In the instant case, Spiegel was survived by three children and three grandchildren, and he left no wife. The trust made provision for all of his family. The Tax Court stated (R. 129) that Spiegel "in creating the trust, retained no 'string or tie' amounting to a possibility of reversion" and it is obvious that the Tax Court was of opinion that Leaman did, and that Spiegel did not, intend his transfer to take effect at death. The decision in *Leaman* is an example of application of the Tax Court's view that reverters by operation of law do not render trust property includable in gross estate unless the facts show that the decedent actually intended his transfer to take effect at or after his death.

Respondent also cites (Res. Br. p. 24) *Estate of Bradley* v. *Commissioner,* 9 T.C. No. 20, as showing that the Tax Court has changed its view. The *Bradley* decision is, however, consistent with the Tax Court's decisions in *Leaman,* as well as in *Estate of Edward P. Hughes, Deceased,* 7 T.C. 1348 (cited in Petitioners' Brief at p. 44 and in Respondent's Brief at p. 23) and *Estate of Nettie Friedman, Deceased,* 8 T.C. 68 (cited in Petitioners' Brief at pp. 39-40, and in Respondent's Brief at p. 23). In its *Bradley* opinion, the court, by clear implication, reaffirms its decisions in the *Hughes* and *Friedman* cases. It, however, sustained the tax in *Bradley* as to one trust, not because of the existence of a reverter by operation of law, but because of an express retention of income by the decedent, which did not fall within *May* v. *Heiner,* 281 U. S. 238, since the

right to such income was retained for a period measured by the life of the settlor's *daughter* who might, and actually did, outlive the settlor. In the instant case no interest in income was retained by the decedent. With respect to the other *Bradley* trust, it contained an *express* provision for payment of corpus to the decedent if his daughter predeceased, and the decedent survived, his wife.

IV.

Under Dobson v. Commissioner, the Tax Court's Decision Is Conclusive.

Respondent's argument, with respect to the controlling force of the *Dobson* doctrine (Res. Br. pp. 26-28) is, basically, that this Court and Courts of Appeals have in instances reversed the Tax Court. He does not answer our argument, made in Point IV of Petitioners' Brief (pp. 46-52), that the Circuit Court of Appeals erred *in the instant case* by its reversal of the Tax Court.

We are at a loss to understand Respondent's statement (Res. Br. p. 27) that:

> "Transfers such as these, where the distribution of the corpus must await the grantor's death, are necessarily intended to take effect in possession or enjoyment at or after such death *as a matter of fact*, and indeed this is recognized in *Reinecke* v. *Northern Trust Co.*, *supra*, page 347. The only question at issue is whether they were so intended as a matter of law." (Italics ours.)

The *Reinecke* case decided (278 U. S. *supra*, at pp. 347-8) that the "possession or enjoyment," referred to in Section 811(c) and similar provisions of earlier Revenue Acts, is the possession or enjoyment which is *retained* by a settlor after an *inter vivos* transfer and passes from him to others at his death. The estate tax law does not concern itself

with the possession or enjoyment acquired by beneficiaries from a trustee upon the settlor's death. Thus, the question, whether a transfer in trust was intended to take effect in possession or enjoyment at or after death, must be decided upon a determination whether the settlor, *as a matter of fact*, intended that *his* right to possession or enjoyment of trust property should cease only at or after his death or immediately upon creation of the trust. See Petitioners' Brief, pp. 37-38.

It is of course true, as the Court recognized in *Reinecke* (p. 347), that, in every instance where a trust instrument sets up a future interest and provides for distribution at or after the settlor's death, possession or enjoyment by *beneficiaries* must be (and, by hypotheses, must always be intended to be) at or after the settlor's death. Nevertheless, the Court in *Reinecke* held that the transfer, there, was not taxable since the *settlor's* possession and enjoyment had been completely transferred from him to the trustee during the settlor's lifetime. By reason of the complete transfer actually effected by the settlor during his life, the Court had no occasion to, and did not, consider whether the settlor *intended* to retain any interest in corpus. He retained no interest and his intent was, accordingly, of no consequence.

Conclusion.

Petitioners submit that this Court should reverse the Circuit Court of Appeals and affirm the Tax Court for the reasons set out in Petitioners' Brief and herein.

Respectfully submitted,

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